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No. 244.

(Dy. of Calhoon & Green for Defts. in Error.)

Filed April 7, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1898.

NO. 756.

OCTOBER TERM, 1899. No. 244.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Plaintiffs in Error,

versus

WIRT ADAMS, STATE REVENUE AGENT,
Defendant in Error to the

SUPREME COURT OF MISSISSIPPI.

Brief on Motion to Dismiss and on Merits,

FOR DEFENDANT IN ERROR, BY

S. S. CALHOON AND MARCELLUS GREEN.

SUPREME COURT OF THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL.,

PLAINTIFFS IN ERROR.

NO. 756; 244. VERSUS.

WIRT ADAMS, STATE REVENUE AGENT

DEFENDANT IN ERROR.

BRIEF OF S. S. CALHOON AND MARCELLUS GREEN FOR DEFENDANT IN ERROR.

This voluminous record contains much matter irrelevant to the decision of the case in this court. The following matters are germain to the questions here involved.

This proceeding was instituted, originally, by Wirt Adams, State Revenue Agent, in 1893, in the circuit court of Hinds county, Mississippi, to recover of Plaintiffs in Error, for the use of the state and of the several counties, the state and county taxes, privilege and *ad valorem*, assessed by the State Railroad Commission, as State Railroad Assessors, upon the railroad and property of the Louisville, New Orleans and Texas Railway Company. Similar suits for the taxes of 1892, 1893, 1894, and 1895 were severally instituted, and in 1896, R. 106, these cases were consolidated.

The declaration avers that the defendant, Yazoo and Mississippi Valley R. R. Company, was duly chartered by Act of the Legislature of Mississippi, approved February 17, 1882, entitled, "An Act incorporating the Yazoo and Mississippi Valley Railroad Company," (its charter being filed with the declaration, R. 45), and that defendant, Illinois Central Railroad Company, was chartered under the laws of Illinois. That Louisville, New Orleans and Texas Railway Company was a corporation authorized under the laws of Mississippi, by Act entitled, "An Act to amend an Act entitled an Act to authorize the Memphis and Vicksburg Railroad Company and the Mississippi Valley and Ship Island Railroad Company to effect a consolidation, approved March 3, 1882," approved March 15, 1884, and was created by a consolidation of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, a Mississippi corporation, created by an Act entitled "An Act to incorporate New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company," approved March 9, 1882, the Memphis and Vicksburg Railroad Company, a Mississippi corporation, chartered in 1870, a Tennessee corporation and a Louisiana corporation, under a deed of consolidation dated August 12, 1884. Copies of said Acts are in Exhibits to the declaration. R. 12, *et seq.* That the taxes, state and county, were duly assessed, and the amounts thereof are recited, and thereby said railroads and property of Louisville, New Orleans and Texas Railway Company became liable therefor; that the Illinois Central Railroad Company purchased in July, 1892, all the railroads and other property of Louisville, New Orleans and Texas Railway Company, and that about October 25, 1892, the Illinois Central Railroad Company "turned over, delivered to and merged all of said property and railroads of said Louisville, New Orleans and Texas Railway Company with the railroad system and property of the said Yazoo and Mississippi R. R. Co.," that since that date said Yazoo and Mississippi Valley R. R. Co., under the direc-

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tion and control of the Illinois Central R. R. Co. has been operating said railroads of Louisville, New Orleans and Texas R'y Co.; that by taking the property and railroads of Louisville, New Orleans and Texas R'y Co. said defendants became liable for the taxes. A copy of the "articles of consolidation" of Louisville, New Orleans and Texas R'y Co. and Yazoo and Mississippi Valley R. R. Co. is made Ex. B. to declaration. R. 14.

By sec v. of the said act of 1882 authorizing the consolidation, the provisions of the 21st section, hereinafter recited, were extended to the consolidated company (R 42). By the act of 1884 this act of 1882 was so amended as to permit consolidation of Memphis & Vicksburg R R. Co. with any other company and without Miss. Valley & Ship I. R. R. Co.

It was under this act that Louisville, New Orleans and Texas Ry. Co. was created by consolidation. R. 12.

The charter of Yazoo & Mississippi Valley R. R. Co was granted in 1882, and, as to power of consolidation, provides: "Said company may consolidate with any other railroad company in or out of the state of Mississippi upon such terms as the consolidating companies may agree upon; * * and upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company herein chartered: nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company." R. 48-9.

By Sec. 8, of this charter the stock, property, &c., of the Yazoo and Mississippi Valley R. R. Co. is exempted from taxation "for a term of twenty years from the com-

pletion of said railroad to the Mississippi river, but not to extend beyond twenty-five years from date of the approval of this Act." R. 52.

The 'Articles of Consolidation' of Louisville, New Orleans and Texas R'y Co. and Yazoo and Mississippi Valley R. R. Co., dated October 24, 1892, are set forth. R. 12.

The charters of New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, and of Vicksburg and Memphis Railroad Company, the constituents of Louisville, New Orleans and Texas Railway Co., contain these pertinent provisions:

SEC. 25. That the company shall have power "to consolidate the company with any other company, under the name of one or both; but when * * such consolidation is effected, the said company shall be entitled to all the benefits, rights, &c., belonging to said road or roads * * consolidated." R. 30. This charter contains no exemption from taxation.

That said company "shall have * * power to consolidate the stock, property and franchises of the road with any other road or roads, in or out of this state * * upon such terms as may be consistent with the powers conferred upon said company." R. 39.

This charter was approved August 8, 1870, and as granted, contains no exemption from taxation.

By an Act, approved August 8, 1870, the provisions of the 21st section of the charter of the Mobile and Northwestern Railroad Co., was extended to the Memphis and Vicksburg Railroad Company, and it is found on R. p. 40.

The Illinois Central Railroad Co. traversed the averments of the declaration so far as they pertained to it. R. 54.

The Yazoo and Mississippi Valley Railroad Company pleaded (R. 55).

1 That Louisville, New Orleans and Texas Railway

Co. was authorized by and organized under the Act *supra* of 1884.

2. That on October 24, 1892, Louisville, New Orleans and Texas Railway Co. "was consolidated with and merged in the said defendant The Yazoo and Mississippi Valley Railroad Company, by Act and deed of said two companies, as authorized by their respective charters."

3. That during 1892, 3, 4, and 5, said Yazoo and Mississippi Valley Railroad Company delivered to the tax collectors the affidavit prescribed by said 21st section, and that said tax collectors gave to defendant a receipt in full for said taxes; and that in said years of 1892, 1893, 1894 and 1895, respectively, the profits of defendant, nor of Louisville, New Orleans and Texas Railway Co., had never enabled either to pay a dividend of 8 per cent on its capital stock.

4. Traverses the averments of the declaration so far as they pertain to Illinois Central Railroad Company.

After demurrer overruled to this plea plaintiff replied: R. 58.

1. Denying that the property was not purchased by Illinois Central Railroad Company.

2. Denying that the profits of Louisville, New Orleans and Texas Railway Company was not sufficient to declare a dividend of 8 per cent on its proper capital stock under the said 21st section.

3. Denying that the amount of the taxes had in good faith been applied as provided in said 21st section.

9. That after building the railroad Louisville, New Orleans and Texas Railway Company had issued bonds aggregating $30,833,000, some bearing 4 per cent, some 5 per cent and some 6 per cent interest, and had sold them to non-residents, and divided the proceeds, except what was required to construct said road, about $4,000,000, among its officers and stockholders, and that said company had so intermingled its liabilities for money used for construction, with money used for division among its officers, &c.,

that it became impossible to appropriate the taxes to the debts contemplated by said 21st section; or tell what rate of interest the construction debt bears; or to make a true affidavit as required, and thereby said exemption was waived. R. 59.

10. That prior to January 1, 1891, Louisville, New Orleans and Texas Railway Company issued to its incorporators and others to make them stockholders 48,242 shares of its capital stock, of par value $100 each for no consideration, and no authority existed by the respective charters of the consolidating companies, or by its charter, to issue gratuitous or paid up stock without its full consideration; and that its profits were able to pay 8 per cent dividend on the full amount paid or agreed to be paid for its capital stock, over and above its current due liabilities for debts incurred in and about said road as contemplated by its charter; that the illegal issue of said stock has made it practically impossible to determine when its profits will enable it to pay 8 per cent dividend on its proper capital stock, and thereby said exemption was waived. R. 60.

11. That previous to said assessment the Illinois Central Railroad Company had paid off by an issue of its own bonds, by novation, all the debts and liabilities incurred in such construction, &c., and the dividends enabled it to pay 8 per cent on its proper stock, and thereby the alleged "appropriation of taxes" ceased. R. 60.

14. That all of said property, except the "main line" and "Tallahatchie branch," was acquired by L., N. O. & T. R'y Co. by purchase, or under other charters, and it is liable to taxation.

There were other replications averring nothing material here, and demurrers were sustained to them. R. 57-9, 87.

To the foregoing replications demurrers were overruled, and issues finally taken on the matters averred in them. R. 87, 89, 90, 91, 93.

Upon these issues the first trial was had in which a volume of evidence was introduced tending to show the facts in regard to the consolidation of October 24, 1892, and the amount of valid stock, and of the debts of construction, money borrowed therefor, &c.

It will be noted that there is no right claimed, either in the pleadings or or in the evidence, under the Constitution or laws of the United States, in this first trial; and that none of the decisions of the supreme court of Mississippi were pleaded as *res adjudicata*, nor introduced in evidence on the trial.

Upon this record there was verdict for the plaintiff for the taxes of 1895, and for the defendant for those of 1892, 3 and 4, and judgment accordingly.

Both plaintiff and defendant moved for a new trial; both motions were overruled, and both parties appealed to the October Term, 1896, of supreme court of Mississippi.

By the assignments of error in the supreme court of Mississippi, R. 503-9, no right was claimed by either side under the Constitution or laws of the United States.

The case was thrice argued before the supreme court of the state, and on June 20, 1898, (erroneously recited in the record June 30, and corrected by stipulation) that court reversed the judgment and remanded the cause for a new trial.

The opinion of the court—summary of the court's holdings—is found R. 513, and it does not decide any right claimed by these plaintiffs in error under the Constitution and laws of the United States.

Thereupon these plaintiffs in error, on June 27, 1897, filed a suggestion of error to the court, R. 518, under Rule 10, viz: "The court will at any time during the term at which a judgment is rendered, consider a matter or suggestion of error of law or fact therein, and will take such action as will seem proper." 70 Miss., XXIII, in which it was claimed that this decision impaired the obligation

of their charter contract, was not due process of law, and denied them equal protection of the laws.

No order of the court was made on this suggestion of error; but the clerk certifies that the practice of the court is, where suggestions of error are denied or overruled, to return the same without endorsement thereon, and without an order or entry on the minutes, and that this suggestion of error took this course. R. 527.

After an abortive effort to have the mandate withheld, R. 528, the cause was remanded to the circuit court July 1, 1898, R. 548, and the mandate was filed July 4, 1898.

Thereupon defendants objected to proceeding because a mandate as prescribed by the statute had not been filed; this being overruled, they then objected that under the statute the cause could not be docketed for trial at that term; this, also, was overruled on July 4, 1898. R. 529. 529 No federal question was claimed in the circuit court to arise on these objections.

Defendants then presented a petition and bond for removal of said suit, No. 2788, for the taxes of 1892, 3, 4 and 5, which had been filed June 27, 1898, while the suggestion of error was pending in the supreme court in this case on the first appeal. R. 531. The court denied this petition. R. 544.

Then defendants moved for a continuance because not ready for trial, and of the absence of some of their attorneys, R. 544: this, after hearing evidence, the court overruled. No right under the Constitution and laws of the United States was claimed to arise in the circuit court on this motion.

Thereupon, the defendants requested the court to grant until next morning "to prepare pleas to meet the new aspect put upon the case, in their opinion by the decision of the supreme court." (R. 608). On July 6, all counsel being present, "the court inquired of counsel if their pleas were ready; whereupon counsel for defense

replied that they were, and produced the same and handed them to the clerk of the court in the presence of counsel for plaintiff and without any objection by them. The clerk thereupon marked the same filed before they were submitted to the court or counsel for the plaintiff and without any leave of the court to file same other than as stated above. The counsel for the plaintiff obtained said pleas from the clerk, after the same had been marked filed by him and asked time until 3 o'clock in the afternoon to consider the same, which was granted." Thereupon, in the afternoon the plaintiff filed his motion to strike the pleas, so filed, from the files, and before hearing said motion, it was amended so as to confine its operation to the pleas, 3, 4, 5, 6 and 7 of each of defendants. R. 608-9.

The record stood in this cause at this time as an action to recover the taxes of 1892, 3, 4 and 5, with the pleas standing thereto upon which the former trial was had, and with the said pleas, filed, July 5, 1898, with the motion to strike out pleas 3 to 7 inclusive. Plea 2, filed July 6, 1898, (R. 551, 578)—not included in the motion to strike out—averred said 21st section, its embodiment into the charter of the consolidated company under the articles of consolidation of October 24, 1892, under the Act of 1882, as amended by said Act of 1884, that said railroad was constructed and equipped thereunder, in reliance upon said 21st section; that said charter constituted "a contract between said railroad company and the state * * * and whereby * * it was contracted irrepealably for a period of 25 years from the approval of said Act * * that in consideration of the construction of the railroads provided for in said Act and of the general benefit that the state would receive therefrom, * * the state agreed and contracted that all of the taxes to which said company should be subject should be and were appropriated and set apart and directed to be applied by said company to the payment of the debts and liabilities which the said company should incur in constructing said railroad and to

the repayment of moneys borrowed by said company, upon lands or otherwise, to be used in constructing said road and to the payment of debts incurred by said constructing the same;" that enormous debts and liabilities were incurred and money was borrowed and used in construction conformably to said charter; that during the years 1892, 3, 4 and 5, said defendant did pursuant to said section of said Act and said contract of appropriation, pay said taxes to the full extent thereof, in the payment of the debts and liabilities incurred in said construction and in the repayment of moneys borrowed therefor by Louisville, New Orleans and Texas Railway Company; and that said affidavit as prescribed by said section was duly made; that the tax collector gave defendant a receipt in full for said taxes: that on October 24, 1892, said Louisville, New Orleans and Texas Railway Company, was consolidated with and merged in the said defendant Yazoo and Mississippi Valley Railroad Company, by the act and deed of the said two companies, as authorized by their charters, by which said consolidation the existence of the said Louisville, New Orleans and Texas Railway Company was merged into that of the said Yazoo and Mississippi Valley Railroad Company without creating a new company or disturbing or breaking the continuous existence of the latter company"; and it then traverses the matters averred in the declaration pertaining to the purchase of the Louisville New Orleans and Texas Railway ~~Company~~ by the Illinois Central Railroad Company, and the turning over, delivery to and merger of Louisville, New Orleans and Texas Railway ~~Company~~ into the system of the Yazoo and Mississippi Valley Railroad Company, &c.

Upon this plea 2, issue was taken, R. 609, and it, with the pleas filed at the former term, were the issues in the case when the motion to strike out the pleas 3 to 7, filed July 6, 1898, was heard.

Plaintiff moved to strike out said pleas 3 to 7, for numerous reasons, R. 606, among them, I. That they

were improperly filed. 2. Because no defense as the case now stands. 3. Because these defenses can be set up under the pleas now on file, and because they seek to review the decision of the supreme court. 4. That the matters have been adjudged; and, 5. Because the pleas 3, 4, 5 and 6, are so framed as to prejudice, embarrass and delay a fair trial; and as that the precise defense intended, because of their indefiniteness, uncertainty and complication, cannot be ascertained; and for numerous other reasons, some as to the merits of the pleas, others to the practice and procedure.

The pleas are on R 551 to 606, and to abstract them would be to deprive the objection of prolixity, indefiniteness, uncertainty and complication of their force. Substantially stated, they are a prolix, vague, uncertain endeavor to inject into the record a federal question upon the ground that the decision of the supreme court had violated their constitutional rights.

The court, as shown, supra, R. 608, and as stated in the bill of exceptions, recited the facts showing that these pleas were filed without leave of court and without consent, and sustained the motion to strike them out, generally, without specifying any particular ground; nor does the bill of exceptions show any request by defendants' counsel for a specification or refusal by the court of the ground of the ruling. R, 608. Defendant's counsel at hearing of this motion withdrew plea 7. R. 609.

There is no application for leave to file the pleas so stricken out after they were stricken out; nor any application to make the pleas conform to the views of the court, in the record; nor any suggestion that any right was claimed under the Constitution and laws of the United States as being raised by the action of the court in striking the pleas from the files.

This motion to strike out was sustained July 7, 1898, R. 608, and on the same day this entry was made on the minutes by defendants. "In this cause the court having

strick n from the files the pleas of the two defendants respectively numbered 3, 4, 5 and 6, filed by them in order to meet the new aspect put upon the case by the decision of the supreme court herein rendered on the 20th of June, 1898, the said defendants hereby withdraw the joint plea filed by them prior to such decision and all other pleas filed before that decision, and also withdraw the two pleas filed by them respectively at this term numbered 2, and decline to plead further herein," and this is signed by defendant's counsel.

This withdrawal of all the pleas filed, left the case as stated in the declaration for the taxes of 1892, 3, 4 and 5, without any defense made, and a refusal to defend further.

On December 18, 1896, there was filed in said circuit court a similar suit for the taxes of 1896. (R. 622-9,) No. 3059; and on December 24, 1897, there was filed in the said circuit court a similar suit for the taxes of 1897, No. 3142. (R. 611-8.) These suits were pending in said circuit court at the July Term, 1898—the appearance term thereof, having been returnable January Term, 1897 as to the suit for 1896 taxes, and January Term, 1898, as to the suit for 1897 taxes—and no pleas having been filed therein on July 7, 1898, when said withdrawal of pleas as to the suit for 1892, 3, 4 and 5 taxes was made, and no orders of any kind had been made therein by the court.

On July 8, 1898, this entry is made on the minutes, R. 610. "On the 21st day of July, 1896, causes numbered 2788, 2916 and 3018, the suits of plaintiff against defendants for the taxes of the years 1892, 1893, 1894 and 1895, respectively, were consolidated; and after that proceeded with as one case under said number 2788, and now by consent of all parties, said consolidated case embracing said three cases is further consolidated with cases numbered 3069 and 3142, the suits of the plaintiff against defendants for the taxes for the years 1896 and 1897, respectively, and hereafter all of said suits shall proceed as one suit under the said number 2788, and it is ordered

that all the orders, proceedings and pleadings in one shall be appropriated to each and all of said cases with the proper changes of dates and amounts for each of said years 1892, 1893, 1894, 1895, 1896 and 1897. This order is made to save the expenses and inconvenience of separate pleadings and trials in each case, and is not to be construed to the prejudice of either party, and all objections and exceptions are reserved which could be reserved if said orders, pleadings and proceedings were all separate.

This order, at the request of all parties, is entered as of the 4th day of July, 1898, and shall take effect as of that date, at which date the same was made."

Thereupon judgment *nil dicit* was rendered for the taxes of 1892 to 1897—a writ of inquiry being waived by defendants' counsel. R. 630 1.

There was an appeal from this judgment to the supreme court of the state to the October Term, 1898.

On November 22, 1898, the opinion of the supreme court was filed on the first appeal, and is found R. 638, no federal question is decided by that opinion, and reference is made to the full opinion.

The Yazoo and Mississippi Valley Railroad Company and Illinois Central Railroad Company moved to strike out this opinion, as too late and as improperly filed, R. 676; upon overruling this motion, the court delivered its opinion. R. 678.

On this last appeal to the supreme court, R. 183, numerous errors were complained of in regard to practice and procedure; and of the failure of the court to attach plaintiff's demurrer to defendant's pleas to the declaration; and that the court erred in overruling the defendant's objection to proceeding to trial in the absence of an opinion of the court under Section 4381, Code 1892; and because two weeks of the term had already expired, the effect of which was, as assigned, violative of the 14th amendment to the Constitution of the United States; that the court erred in denying the petition to remove to the

United States court; and in overruling the motion for continuance; and that, in overruling the objection to proceeding to trial in the absence of the opinion as required by said Section 4381, Code 1892, and in docketing the cause for trial after the term began, and in overruling the motion for a continuance, the effect was to violate said 14th amendment; that the court erred in striking out the 4th, 5th and 6th pleas of defendant.

On February 20, 1899, the supreme court of the state affirmed the judgment of the circuit court.

The opinion of the court, R. 685, does not decide any federal question, except that the refusal of the petition to remove was correct, and it places the decisions upon the questions of practice; and that all the taxes sued for accrued after the consolidation of 1892, and that by the former opinion it was held that such consolidation lost the exemption; and that the exemption was repealed by the Code 1892.

From this judgment the case comes to this court by writ of error from the supreme court of Mississippi.

There was a motion made in this court to dismiss for want of jurisdiction, and the court postponed the decision of the motion to the hearing on the merits.

We refer the court for a further statment of the case to the statement of Messrs. Critz, Beckett and Kimbrough, wherein is pointed out the erroneous statement of the case by the plainttffs in error.

BRIEF.

JURISDICTION.

No right was claimed by plaintiffs in error under the constitution and laws of the United States, as required by sec. 709, Rev. St. U. S., either at a proper time, or in a proper way; nor was any such right drawn in question

and decided adversely to plaintiffs in error; nor was any federal question decided adversely to plaintiffs in error except colorably in the denial of the petition to remove to the Federal court; and this because said petition did not comply with the act of congress.

1. To constitute a denial of such right, under sec. 709, it must *affirmatively* appear *by the record* that the right was *specifically*, i. e., *unmistakably*, set up and claimed, and that it was denied by the court.

Mut. Life Ins. Co. vs. *Kirchoff*, 169, U. S., 107.
Water Power Co. vs. *Street Ry. Co.*, 172, U. S., 488.
Schyler Nat. Bank vs. *Balling*, 150, U. S., 85.
Green Bay vs. *Patten Paper Co.*, 172, U. S., 68.

If the state court decides a federal question the jurisdiction of this court would not attach, where, as here, there were other questions, not federal, decided, in themselves sufficient to sustain the judgment.

McQuade vs. *Trenton*, 172, U. S., 636.
Allen vs. *So. Pacif. R. R. Co.*, 173, U. S., 479.
Henderson Bridge Co. vs. *Henderson, Id.*, 608.,

If the record does not show upon what ground the state court acted, the presumption would be that the state court exercised its discretionary powers rather than that it denied a constitutional right.

Dibble vs. *Bellingham Bay Co.*, 163, U. S., 63.
Meyer vs. *Richmond*, 172, U. S., 101, op. of the Chief Justice.

2. Such right should be claimed, specifically in the *trial* court; but it may be raised for the first time in the supreme court of the state "if it was involved in the case as presented to that court."

Oxley Stave Co. vs. *Butler Co.*, 166, U. S., 656.
Water Power Co. vs. *Street Ry. Co.*, 172, U. S., 488.
Chicago &c. Rd. Co. vs. *Chicago*, 166, U. S., 231.
Meyer vs. *Richmond*, 172, U. S., 93.

It cannot be set up for the first time on petition for rehearing.

Meyer vs. *Richmond*, 172, U. S., 92.
Citizens Sav. Bk. vs. *Owensboro*, 173, U. S., 643.

It cannot be set up after a decision of the cause on its merits by state supreme court, where the question might have been but was not raised before such decision.

Mut. Life Ins. Co. vs. *Kirchoff*, 169, U. S., 107.

And this, even where the pleadings were sought to be amended on the second trial so as, specifically, to present the federal question; and where a motion to so amend has been denied by the state court. The revisory power of this court does not extend to rights denied by the highest court of the state, unless the party plainly and clearly claims the right before the state court decides the case. *Id.* 110. In such case the state supreme court determines the rights of the parties on the first appeal, and after this the suggestion of a federal question comes too late. The supreme court of the state was bound on the second appeal by the previous decision, and could not enter into matters of defense which might have been availed of on the first appeal. *Id.* And this is true, even though, in the second opinion the court responded to the argument of counsel upon the federal question, but adhered to its former decision and did not re-open the questions previously decided. *Id.* 114.

An agreement of parties cannot confer jurisdiction in such cases.

Mills vs. *Brown*, 16, Peters, 525.

A decision in accordance with the practice and reasonable rules of the state court cannot confer jurisdiction.

Commercial Bank vs. *Rochester*, 15, Wall, 639.
Life Ins. Co. vs. *Francisco*, 17 Wall, 673.

The question must have been decided by the state court.

Commercial Bk vs. *Buckingham*, 5, How. 317.
Morrison vs. *Watson*, 154, U. S., 111.

It must be shown by the record.

R. R. Co. vs. *Rock*, 4, Wall, 177.

Re Robertson, 156, U. S., 183.

For this purpose specifications of error cannot be looked to.

Fowler vs. *Lamson*, 164, U. S., 252. *Id.* 454.

Clarke vs. *McDade*, 165 U. S., 168.

The certificate of the presiding judge that the question was raised is not sufficient.

Powell vs. *Brunswick*, 150, U. S., 439.

Applying these principles, we find:

1. That no federal question was even suggested, until after the cause had been decided on the first appeal by the supreme court of the state.

2. That no federal question was decided by the state supreme court on the first appeal. R. 513.

3. That the first suggestion of a federal question was upon a suggestion of error, complaining to the state supreme court that there was error of law in its opinion on the first appeal. R. 518.

4. This suggestion of error, as shown by the rules of practice of the state supreme court, is not a pleading in said court; it is an informal complaint of the opinion, and does not call for any order of the court, except at the pleasure of the court. The court thereon "will take such action as may seem proper." Rule 10, 70 Miss., xxiii.

5. No order was made on the suggestion of error. The court took no action of record thereon. The certificate of the clerk of the supreme court, R. 527, as to the usual practice upon suggestions of error, is not a part of the record and cannot be considered.

Walker vs. *Villaso*, 6 Wall, 124.

6. This suggestion of error does not rise to the dignity of a petition for rehearing, denied; and even that would not suffice.

7. When the cause was remanded by the supreme

court for a new trial, the decision of every question involved in the case had become *res aajudicata.*

Mut. Life Ins. Co., vs. *Kirchoff*, 169, U. S., 107.
McDonald vs. *Green*, 13, S. & M., 138.
Bridgeforth vs. *Gray*. 39, Miss., 136.
Leblanc vs. *Railroad Co.*, 73, Miss., 468.

The circuit or trial court was bound by the mandate of the supreme court, and that, as to the trial court, was 'the law of the case'.

8. Not only the circuit court but this court on this writ of error is bound by the opinion and judgment of the state supreme court, on this first appeal; because it involves a construction of the general principles of law, and an interpretation of its own constitution and laws, without any federal question being drawn in question and decided.

Bank vs. *Citizens Bank*, 14 Wall, 9. *Id.* 10. *Id.* 611.
Henderson Bridge Co. vs. *Henderson*, 173, U. S., 602.
S. C., 141, U. S., 689.
Covington vs. *Kentucky*, 173, U. S., 231.
Turner vs. *Wilkes Co.*, 173, U. S., 461.
Wilson vs. *North Carolina*, 169, U. S., 586.

The question of *res adjudicata, vel non*, did not raise a federal question.
Henderson Bridge Co. vs. *Henderson*, 173, U. S., 608.

9. The only way known to the law of raising the question of *res adjudicata* is to plead the judgment in bar; or to introduce the record of the judgment in evidence as an estoppel.

U. S. vs. *Bliss*, 172, U. S., 321.

This was not done; and the mention of the Lambert case, 70, Miss., 729, and of Miss. Mills vs. Cook, 56, Miss., 40, in the opinion of the court on the first appeal was in response to the argument of counsel and not upon any such issue made in the record.

10. Upon remand of the cause after the first appeal objection was made to proceeding with the cause because the opinion accompanying the mandate did not conform to

the state statute; and, also, because the cause was not properly docketed for trial at that term under the state statute; and a continuance was requested because the parties were not ready, and because of the absence of some of the attorneys. No suggestion was made in the trial court that these objections, and this application for continuance, drew in question any right under the constitution and laws of the United States. Such suggestion is made for the first time by the assignment of error in the state supreme court on the second appeal. R. 529, 54 , 634.

The decision of these questions of practice and proceedure would involve no violation of the federal laws or constitution. The right now claimed was not involved upon the record in the circuit court, and it could not be drawn in for the first time on appeal by the specifications or assignment of error. The decision of the supreme court on the last appeal did not decide any federal question as to these matters. It could not properly have done so, as no such question was made by the record.

11. The action of the court in striking out the Pleas 3 to 6, inclusive, did not draw in question nor decide any federal question.

Under the Code, 1892, sec. 722: "The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the court, by rule or otherwise, may allow."

"Where a plea is filed at a term subsequent to that at which the process is returned served on the defendants, and the record does not show that this plea is filed by leave of court, the plea will be so radically defective that it may be disregarded by plaintiff; nor will it make any difference if the plea recite, in the body of it, that it was filed "by leave of the court": the record must show the permission affirmatively: if therefore a verdict be rendered, and such plea be undisposed of in the record, and it does not appear by the record that it was filed by leave, it will not be error."

Wright vs. *Alexander*, 11 S. & M., 411.

The special bill of exceptions shows that the facts in regard to the leave of court to file the pleas were gone into, and they alone are preserved as the facts attendant upon the striking out. R. 608.

The motion to strike out embraced numerous grounds, among others: 1. That the pleas were *improperly filed*: 2. That they were no defense *as the case then stood*: 3. That they seek to review the decision of the supreme court: 4. That the matters have been adjudged: 5. That they were so vague, uncertain and indefinite as to prejudice, embarrass and delay a fair trial, etc., etc.

1. That the pleas were improperly filed, that is, without leave of court, is clear; therefore, the motion should have been sustained on this ground.

Price vs. *Sinclair*, 5, S. & M., 258.

2. That the pleas were no defense *as the case then stood*, because of the decision of the supreme court on the first appeal; and that in such case an amendment should not be allowed to set up the federal question is settled.

Mut. Life Ins. Co. vs. *Kirchoff*, 169 U. S., 107.

3. The code 1892, sec. 704, provides: "If the allegations of a pleading be so indefinite or uncertain that the precise nature of the complaint or defense be not apparent, or if any pleading be so framed as to prejudice, embarrass or delay a fair trial of the action, the court on the application of the opposite party, shall cause the same to be made more definite and certain, or may strike the same from the files."

An examination of the pleas 4, 5, and 6, of which complaint only is made here, will show that a reasonable interpretation of them would make them fall under the condemnation of this statute. Under this statute it was in the discretion of the court to strike out. A finding of fact that they violate the statute is not reviewable here.

Therefore, even if these pleas set up a federal question, they were filed and framed in violation of the prac-

tice and procedure of the circuit court; and because of this, and quite independent of any federal question, the court should have sustained the motion to strike out. As the record is silent as to the ground upon which the court acted,—except that it indicates it was because no leave was granted,—and as it was not assigned for error in the supreme court of the state that the striking out of these pleas raised a federal question, R. 584, this court would impute the action to matters of discretion of the trial court, if possible, rather than to a violation of the constitution.

Dibble vs. *Bellingham Bay Co.*, 163, U. S., *supra:*

Upon the record it does not unmistakably and affirmatively appear that the state court decided any federal question in striking out these pleas; and, if it did, the federal question was not raised at the proper time and in the proper way.

12. There was no request made for leave to file the pleas after the motion to strike out was sustained; nor was any application made to make the pleas certain and definite. The record stands on the general order sustaining the motion.

13. Complaint was made in the supreme court of the state, and here of striking out the 4th, 5th, and 6th pleas; but no objection is made in either court by the assignments of error that striking these pleas out raised or decided a federal question. R. 684, 703, 4.

14. If the motion to strike out should be construed as involving, by implication, an application to file the pleas —contrary to the fact—then this was addressed to the *discretion* of the court, and involved the finding of the facts, outside of the merits or demerits of the pleas, in respect to diligence and excuse for not pleading these matters sooner.

McAdory vs. *Turner*, 56 Miss., 666.

In Mut. Ins. Co. vs. Kirchoff, 169 U. S., *supra*., this

court held that such an amendment came too late after reversal on the first appeal.

15. Considering it as an application to file the pleas this court must examine them from the standpoint of the trial judge, and with regard to the facts within his knowledge, in determining whether there was a specific denial of such right under the federal laws or whether other good reasons might not have been the ground of that decision. The bill of exceptions is silent on this point, and as the plaintiffs in error must show that the court decided a federal question unmistakably, this very uncertainty would deprive this court of jurisdiction.

But considering plea 4, it appears that it attempts to set up that the obligation of the contract rights are impaired by this suit and the decision of this cause on June 20, 1898; and that thereby plaintiffs in error are denied equal protection of the laws; and that thereby they are deprived of their property without due process of law, in violation of the constitution of the United States; R. 557. When applied to the facts of record, and to those in the knowledge of the court, both of which must be considered, as, also, to the law of the case, it is clear that the court would be right in denying an application to file this plea: because,

1. The constitution of 1869, by sec. 13, art. xii, provides: "The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals" and the state supreme court finds as a fact that this provision was not interpreted in Miss. Mills vs. Cook, 56 Miss., 40, nor in any of the subsequent decisions relied on in the plea as establishing a rule of property, a vested right or contract, with reference to the identical questions here involved, in that, in none of said decisions was considered or decided the effect of said section 13, in its relation to sec. 20, art. xii., const. 1869: "Taxation shall be equal and uniform throughout the state. All

property shall be taxed in proportion to its value to be ascertained as directed by law."

2. In Mills vs. Cook there was a general exemption law applicable to all persons and corporations alike, and not, as here, a grant of a special exemption by a special act to a particular corporation, while other railroad property was selected for taxation and taxed.

3. In Miss. Mills vs. Cook, there was no *irrepealable* exemption, while by said 21st section the exemption was declared to be *irrepealable.*

4. The opinion of the supreme court shows that none of the cases so relied on are authority for this case, and clearly and conclusively differentiates them. R. 659 *et seq.*

5. The supreme court held that the exemption, if existent, was repealed by the act of 1886 and code of 1892.

6. The supreme court *upon the facts,* as well as the law, (the Lambert case, 70 Miss., 779, was decided on demurrer) held that under sec. 180, const. 1890, and what was actually done by said consolidation of 1892, the exemption was lost, and neither said sec. 180, nor the facts as to the consolidation of 1892 were considered or determined by said Lambert case. And this, as declared by the court in its last opinion, was the main ground of the decision on the first appeal. P. 686-7.

The Lambert case relied on involved the taxes on property in Adams county only for 1891-2, and the exemption there claimed was under the charter of Natchez, Jackson and Columbus Railroad Company, as re-enacted, according to the opinion of the court, by the act of 1884, which exemption had been assigned to Louisville, New Orleans and Texas Railway Company, and by it carried into the consolidation of 1892, while in this case the exemption is claimed under the consolidated company's charter, under the acts of 1882 and 1884, as conveyed to the consolidated company, Yazoo and Mississippi Valley Railroad company, by consolidation of said companies under their respective charters, by deed of Oct. 25, 1892; therefore, an exemption

upon different property, under a different grant of exemption, acquired by a different title, and under different statutes.

In *N. O. Water Works Co.* vs. *La. Sug. Ref. Co.*, 125, U. S., *supra*, the court held that the finding of the state court as to the differences between its own decisions would bind this court.

In *Wood* vs. *Brady*, 150, U. S., 18–22, it is declared that assuming for the purposes of the case that there may be a vested right in an erroneous decision, the argument that the statutes are similar, and, therefore, a like construction should be placed upon them, must be addressed to the state court; and when the state court has assumed to distinguish between the two acts it is not the province of this court to say that the distinction is not well taken.

8. Because said plea 4 fails to aver, and it could not truthfully do so, that the decision was based on the federal question or that the decision of the federal questions averred was necessarily involved in that decision.

In fact, the whole defense was based upon the state statutes and constitutions, and it was not until after this defense had failed that refuge was attempted to be taken under the federal constitution.

9. Said 4th plea does not aver that any subsequent statute was passed after the consolidation of Oct., 1892, impairing the obligation of that contract; its complaint is that this decision does not sustain the interpretation of the former decisions of the court which plaintiffs in error aver they relied on, but which the court now holds was an erroneous interpretation and not sustained by the cases.

10. The first opinion decided what was the proper interpretation of the charter powers of consolidation of Louisville, New Orleans & Texas Ry. Co. and of Yazoo & Mississippi Valley Railroad Co., and the effect of sec. 180, const. 1890, upon these, then, unexecuted powers in respect to an exemption from taxation when said powers were executed in 1892.

11. Because the exemption, if existent, was repealed by code 1892.

12. Because the first opinion finds *as a fact* that what was actually done under the consolidation of 1892 formed a *new company*. This finding is binding on this court.

Backus vs. *Fort Street Depot Co.*, 169, U. S., 563.

13. Because there was no contract evidenced by said sec. 5 (21), the obligation of which was protected by the federal constitution. Louisville, New Orleans & Texas Ry. Co. acquired, under sec. 5, (21) acts of 1882 and 1884, authorizing consolidation, the only exemption the Yazoo & Mississippi Valley Railroad Co. as consolidated Oct. 24, 1892, had; for the charter of Yazoo & Mississippi Valley Railroad Co. contained only an unperformed, conditional exemption. Acts 1882, p. 847. Both of these charters were subject to sec. 13, art. xii, const. 1869, *supra*, which forbade *irrepealable* contracts of exemption. This 4th plea avers this to be the law under the rule in Miss. Mills vs. Cook and the other cases there relied on, and it is expressly so decided in the Lambert case.

Where the power to alter or repeal an exemption from taxation is reserved a subsequent statute taxing the property would not impair the obligation of the contract.

Louisville Water Co. vs. *Clark*, 143, U. S., 1.

Citizens Bank vs *Owensboro*, 173, U. S., 644.

14. Because the power to consolidate under the respective charters of the Louisville, New Orleans & Texas Ry. Co. and of the Yazoo & Mississippi Valley R. R. Co. was a mere license, revocable at will, at any time before exercise, and such revocation does not impair the obligation of any contract.

Galveston etc. *Ry. Co* vs. *Texas*,, 170, U. S., 226.

Hence, the framers of the constitution of 1890 were unfettered by any federal question in dealing with the future exercise of powers of consolidation or merger then existing.

15. By sec. 180, const. 1890, "All existing charters or

grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this constitution shall be subject to the provisions of this article", etc., and by sec. 181 of "this article" it is provided that: "The property of all private corporations for pecuniary profit shall be taxed in the same way and to the same extent as the property of individuals", etc.

Hence, the state court in deciding that by consolidation in October, 1892, under powers granted prior to 1890, the exemption, if existent, was lost, could not have impaired the obligation of any contract.

16. As the record is silent as to the reasons of the court in sustaining this motion to strike out, and as the matter of permitting the filing of pleas out of time is addressed to the discretion of the court in great degree, as with motions for continuance the court is not bound by the face of the application, but may apply its knowledge of the facts to the solution of the question.

Strauss vs. *State*, 58 Miss., 54.

This would include the facts reasonably within the knowledge of the trial court, and if these facts do not appear in this record it is because of the fault of plaintiffs in error in not having the reasons for the decision of the court in this record.

The trial judge, as also the supreme court, must be presumed to have known what the record in the Lambert case sought to be pleaded in the 4th plea actually showed and that was this: that it was a bill by the Natchez, Jackson and Columbus Railroad Company as a going "concern," joining Yazoo and Mississippi Valley Railroad Company as grantee, as complainant, against Lambert, sheriff of Adams county, seeking to restrain by injunction the collection of the state and county taxes of 1891 and 1892 upon that part of the property of Natchez, Jackson and Columbus Railroad Company in Adams county, upon the ground: That by Act of the Legislature of August 8, 1870, the said 21st section was extended to Natchez, Jack-

son and Columbus Railroad Company, and that as amended by the act of March 5th, 1878, the benefits of the said 21st section were also granted, and that this 21st section was a contract "irrepealable and inviolable." That the Natchez, Jackson and Columbus Railroad Company on the faith of these Acts invested its funds in and constructed its railroad, and since its construction has employed its capital in the operation and maintenance thereof, relying on said contract; and reposing in the belief "that the taxes to which it was subject, would be appropriated by the state of Mississippi to the payment of its debts and liabilities incurred in the construction of said railroad, and as provided for by said 21st section, * * and that "said contract and agreement on the part of the state of Mississippi went far beyond the mere privilege of an exemption from taxation, the state having solemnly agreed in said contract and by the Acts of the Legislature aforesaid, that if said company should construct a railroad as provided for in its charter and amendments thereto and should incur debts and liabilities, in so doing, that unless the earnings of said company should entitle it to declare and pay to its stockholders a dividend of eight per cent upon its capital stock, over and above its liabilities, that the taxes to which it was subject for the term of 30 years from the date of incorporation, in 1870, should be appropriated by the state of Mississippi, to the payment of the debts and liabilities incurred by the company in building said road;" and that by a sale of its property, rights, franchises, privileges and immunities under the Act of 1890, said immunity from taxation passed to the purchaser, Louisville, New Orleans and Texas Railway Company; and that by said consolidation of 1892, said immunity from taxation passed to Yazoo and Mississippi Valley Railroad Company; that on Oct. 25. 1892, "the Louisville, New Orleans and Texas Railway Co., was merged into and consolidated with the Yazoo and Mississippi Valley Railroad Co., and that by said merger and consolidation the capital stock,

franchises, etc., of Louisville, New Orleans and Texas R'y Co., was merged into and became the property of Yazoo and Mississippi Valley Railroad Co.; that the franchise to be a corporation did not pass by said sale to Louisville, New Orleans and Texas Railway Co., but that since said sale Natchez, Jackson and Columbus Railroad Co., has preserved its organization, had meetings of stockholders and directors, and was a "going" corporation; that the amount of taxes of 1891 and 1892 had been applied upon its debts of construction by Natchez, Jackson and Columbus Railway Co.; and that the tax collector refused to accept the affidavit of either Natchez, Jackson and Columbus Railroad Co., or Louisville, New Orleans and Texas Railway Co., (Yazoo and Mississippi Valley Railroad Co.,) in payment of the taxes; and prays injunction. The bill was demurred to, but not upon the ground of the unconstitutionality of said 21st section; nor of the effect of Section 180 of the Constitution of 1890 upon said consolidation of 1892; nor of the repeal of the exemption from taxation by the Acts of 1878, 1836 and Code of 1892.

This demurrer was sustained in the chancery court, and the Natchez, Jackson and Columbus Railroad Co. and Yazoo and Mississippi Valley Railroad Co. appealed. There was also a plea filed setting up that Louisville, New Orleans and Texas Railway Co., on Feb. 29, 1892, before consolidation with Yazoo and Mississippi Valley Railroad Co., exhibited its bill against said Lambert to restrain the collection of the identical tax for 1891, to which bill a demurrer had been sustained, and that it was then on appeal, and that this pending suit was a bar.

The record in support of said plea shows a bill by Louisville, New Orleans and Texas Railway Co. vs. Lambert, substantially like that in N., J. & Co. R. R. Co. vs. Lambert, except that Louisville, New Orleans and Texas Railway Co., made the affidavit provided for by Sec. 21, and Lambert refused to execute receipt; (the affidavit showed that Louisville, New Orleans and Texas Railway Co., had,

"during the year 1891, actually and in good faith, paid and applied to the payment of debts and liabilities which they may have incurred in the construction of said road, for money borrowed by said company upon said lands or otherwise to be used in constructing said road, a sum equal," etc. This bill was demurred to, the demurrer sustained and bill dismissed by chancellor; and this appeal was pending when the bill was filed by Natchez, Jackson and Columbus Railroad Company, and Yazoo and Mississippi Valley Railroad Co., vs. Lambert, *supra*; and both appeals were decided by the case of Natchez, Jackson and Columbus Railroad Co., vs. Lambert, 70 Miss. 279. By the opinion it was held that the plea of former adjudication (pending suit) was bad because the suit was "fatally defective." The complainant (N. J. & C. R. R. Co.,) could not take any benefit from it. It was founded on an affidavit pleaded as a tender for the taxes of 1891, which had no reference to the N., J. & C. R. R, but to a different one," (L. N. O. & T. Ry Co.,) and the decree in L., N. O. & T. Ry Co., vs. Lam' was *affirmed*. The decree in N., J. & C. R. R. Co., vs. La. 'ert was reversed, the demurrer overruled, and leave given to answer.

By the *records* in these Lambert cases we find that the court holds; 1, that the alleged contract of appropriation was an exemption, a "mere grace", repealable at will: 2. that N. J. & C. R. R. Co., as a "going" corporation had the right to pay the taxes on the property it had conveyed to L. N. O. & T. Ry Co., by an affidavit that it had applied the amount of the taxes due upon said property to *its* debts of construction; 3. that L. N. O. & T. R. Co., the purchaser, did not have the right to pay the taxes on said property by an affidavit that L. N. O. & T. Ry. Co., had applied the amount of the taxes on said property to *its* debts of construction: 4. that N. J. & C. R. R. Co. was a going corporation in 1891 and 1892: that said 21st section was repealed by the act of 1875 and by the code of 1880 — there being no averment of any exemption under

the acts of 1884 or 1890 or const. 1890 no such question could be adjudged, *O. & M. R. R. Co.*, vs. *Wiggins* 142. U S. 396,—there could be no adjudication of any immunity from taxation under said acts recited in the opinion.

The bill in Lambert's case was filed in Nov. 1892, the chancellor dismissed the bill on this demurrer, and the supreme court reversed the decree in May 1893.

In the instant case the State Supreme Court finds as a fact from its records that the Lambert case held said 21st section to be an exemption not "a contract of appropriation;" that the constitutionality of said 21st section was not decided: that Sec. 180 const. 1890 in its effect upon said consolidation of 1892 was not drawn in question; that said act of 1886 and code of 1892, repealing the exemption, if existent, were not considered or decided.

This finding is binding upon this court.

New Orleans Water Works Co. vs. *La., Sug. Ref. Co.* 125, U. S. 136-7.

Backus, vs. *Fort Street Depot Co. Supra.*

17. The rule of identity prescribed would make applicable the principles of *res adjudicata.*

A judgment for one year's taxes is not a bar to a suit for another year's taxes is the rule announced in the instant case, as also in *Keokuk* vs. *Missouri* 152, U. S. 301. This case was differentiated in New Orleans, vs. Citizens Bank, 167 U. S. 317, by declaring that its reasoning was not considered as relating to a case where the validity of the tax was resisted *on a particular ground. which particular and special defense* had been previously held between the same parties to be valid under *identically the same conditions and circumstances.*" 173 U.S. 636. 174 U.S. 412

In *Dennison* vs. *U. S* 168, U. S. 249, the suit was not for the same but similar items, and it was held to fall within *Cromwell* vs. *Sac* 94, U. S 351, "where the sec. ond action between the same parties is upon a different claim or demand the judgment in the prior action operates as an estoppel only as to to those matters in issue or

points controverted, upon the determination of which the finding or verdict was rendered."

So in *So. Pac. R. R. Co.* vs. *U. S.* 168, U. S. 50, the court says: "the inquiry in such case being 'as to the point or question actually litigated and determined in the original action' not what might have been litigated and determined."

A rule of property cannot be created "upon a ground not put in issue there but *conceded* by counsel in favor of the company."

Keokuk vs. *Missouri* 152, U. S, 316.

Even a waiver of an exemption not introduced in evidence on the first trial may be shown on the second trial to defeat the exemption established by the former judgment.

Sloan vs. *Price* 84, Ga. 171

Where the exemption depends on the use of the property a suit for the taxes of one year is not a bar to an action for another year.

Red vs *Morris* 72, Tex. 554.

Or where the facts must vary from year to year. *Tubbesing* vs. *Burlington* 68, Iowa 691. and approving 38 Iowa.

Where suit was brought upon a certain statute to recover taxes for certain years and recovery was had, and afterwards suit was brought for subsequent year's taxes for a larger amount because the act upon which the former recovery was had was unconstitutional, it was held that the former recovery was not *res adjudicata*.

Philadelphia vs. *Ridge Ave Co.* 142, Pa, St. 484. S.P. Boyd v ala 94, US. 648.

18. Touching the good faith evidenced by the 4th plea, wherein it is averred, as if *res nova*, that this 21st section was not a contract of "exemption" but a contract of "appropriation," the court knew that the Lambert case had expresaly presented that view, and that it had been held to be an exemption, "mere grace." "It," the legislature, "had complete control of the matter, and could re-

voke the provision for immunity from paying taxes, which is undoubtedly immunity from taxation for *paying is the burden*. 70, Miss, 787. So, the very case relied on as a rule of property had held the 21st section to be an exemption, and the court could not accept this "contract of appropriation" plea.

Said plea 4, avers, also, that this suit is not to recover taxes on the property that formerly belonged to N. J. & C. R. R. Co. (R. 565), but is a suit to recover the taxes on the main line and branches of L. N. O. & T. Ry., under a different charter, and not under the identical facts involved in the Lambert case.

Said plea 4 avers that "proceeding under said charter and under said section 5 as a part thereof the Louisville, New Orleans & Texas Ry. Co. proceeded to construct and equip the railroads contemplated in said acts, beginning the construction thereof in the year 1892 and the connection of track through Memphis * * to New Orleans * * * over the route prescribed by said acts in the latter part of 1884:" R. 659-60, and, also, that the Louisville, New Orleans & Texas Ry Co. was *not formed* by consolidation of the Memphis & Vicksburg R. R. Co. and the New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co. *until August 12 1884*. R. 12. Therefore, said railroad could not have been built under the consolidation of August 12, 1884, creating for the first time Louisville, New Orleans & Texas Ry. Co; and could not have been built by said consolidated Company on the faith of said section 5. (21st section). It was patent to the trial court that this allegation of the existence of the exemption, and of its derivation through section five of the acts of 1892 and 1894, in favor of the consolidated company, was untrue, and that the defendant company did not and could not acquire the exemption in the manner averred

It was also patent that this railroad constructed, as averred, from 1882 to the latter part of 1884, must have been constructed under one of the charters of the consoli-

dating companies. The charter of the Vicksburg & Memphis R. R. Co. contained the exemption, that of New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co., R. 21, contained no exemption. It was not averred under which of the charters of the constituent companies the road was built. Hence, the plea was fatally defective in its allegation of title to the exemption.

Said plea 4, also, averred that in or about July, 1892, Illinois Cen. R. R. Co. purchased of the mortgage bonds of L., N. O. & T. Ry. Co. a large amount, issued from 1882 to 1890, (R. 588, 589), and that about the same time Miss. Valley Co.—of which the Illinois Cen. R. R. Co. owned nearly all the stock—purchased nearly $4,000,000 of the shares of stock of L., N. O. & T. Ry. Co., contemplating and relying upon said sec. 5 (21), act of 1882, and upon said rule of law settled by Miss. Mills case and other cases named; and upon said section 181, const. 1890; and upon said Taylor case, and upon the uniform recognition of said right by all the state departments. Now, the trial judge knew that the Lambert case was not decided until May, 1893, and that the consolidation, by which the exemption was held to be lost, did not occur until Oct. 24, 1892, and, therefore, in this aspect the plea was fatally defective.

In so far as the case of Louisville, New Orleans & Texas Ry. Co. vs. C. E. Taylor, 68 Miss., 361, is relied on, it is answered by the opinion of supreme court holding, upon its own records, that that was a fictitious case founded on a mis statement of fact. R. 667-8.

And every case relied on in said 4th plea is shown by the opinion of the state supreme court, R. 659, *et seq.* not to have been a decision which controlled the decision of this case, but that every one of them was essentially different.

So, upon the facts and the law the state court could have decided that the 4th plea as the case then stood was no defense without deciding a federal question; in such case, this court, upon writ of error from the state supreme

court, will follow the state court in its construction of its own statutes and constitution.

Forsyth vs. *Hammond*, 166 U. S., 518-9.
Wood vs. *Brady*, 150 U. S., *supra*.
Backus vs. *Fort Street Depot Co.*, *supra*.
N. O. Water Works Co. vs. *La. Sug. Ref. Co.*, 125 U. S., 36-7.

Says this court: "We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts or because those judgments in their effect impair the obligation of contracts." *Id.* 30.

EXEMPTION.—REPEAL.

Did any contract for exemption from taxation exist within the ~~protection~~ meaning of the federal constitution; if ~~so~~ not, was it repealed?

The 4th plea predicates its defense upon the existence in 1892 and in subsequent years of an exemption from taxation; first, through the charter of Natchez, Jackson & Columbus R. R. Co., as to the property of that road—really not involved in this suit; second, through sec. 5, (21) acts 1882 and 1884.

The Lambert case, as stated, *supra*, holds that said sec. 21, (5), is an exemption from taxation, and not a contract of appropriation.

First, as to the exemption of N., J. & C. R. R. Co.

This road was chartered July 21, 1870, acts 1870, pp. 221, 233, and its original charter contained no exemption. By sec. 26 of its charter it is provided: "And the rights, power and authority granted in and by this act of incorporation shall be perpetual, except that the same may be altered or amended as necessity may require." Therefore the charter was repealable at will.

Said charter so granted was subject to art xii, sec. 20, const. 1869: "Taxation shall be equal and uniform throughout the state. All property shall be taxed in pro-

portion to its value to be ascertained as directed by law"; and to art. xii, sec. 13: "The property of all corporations for pecuniary profits, shall be subject to taxation, the same as that of individuals."

By an amendment of the said charter, on Aug. 8, 1870, said 21st section was extended to said Natchez, Jackson & Columbus R. R. Co.

By the code of 1871, sec. 1662, it was declared: "The following property, and no other shall be exempt from taxation, towit:" specifying, but not including railroads.

There was no special mention made of railroads in the revenue chapter 22, code 1871, as subject or not to taxation; but it provided that "all incorporated banks or other companies, liable to taxation on their capital stock, shall be assessed," etc. Sec. 1668.

By sec. 1747, chap. 22, code 1871, a privilege tax was imposed on express, telegraph, and insurance companies, but none upon railroads.

In 1875, acts 1875, p. 66, "An act to regulate railroad taxation" was passed, whereby it was provided: "That every railroad company whose line is in whole or in part, in this state, shall pay to the state treasurer * * in each and every year, a privilege tax as follows * * and the said privilege tax shall be in full of all other taxes, state, county and municipal, due from such company, or for which such company or its property could, but for the passage of this act, be made in any manner liable; * * * Provided, That lands owned by railroad companies, and not acquired and used in operating railroads, shall be taxable as other property." This act was construed in Lambert's case to repeal the exemption and to require the payment of this privilege tax of the Natchez, Jackson & Columbus R. R. Co. 70 Miss., 787. This was a *general* taxing statute.

In 1878, an act was passed, acts, 1878, 233, approved March 5, 1878, in regard to the exemption of Natchez, Jackson & Columbus R. R. Co., reciting that 30 miles of the road had been built, and that the said act of 1870 extend-

ing said 21st section to N., J. & C. R. R. Co., was not approved until after the adjournment of the legislature, and that it was not passed upon an aye and nay vote; and, it then again, extends said 21st section to said N., J. & C. R. R. Co. as to future and past taxes. This was a *special* act.

By a general act of 1878, approved the same day as the last special named act, acts 1878, 87, the said general act of 1875 was amended so as to provide: "That every railroad company whose line is in whole or in part in this state, shall pay to the state treasurer * * in each and every year, a privilege tax of eighty dollars per mile, upon each of said roads and branch thereof, in this state, except that upon narrow guage roads the privilege tax shall be but forty dollars per mile, and the said privilege tax shall be in full of all state, municipal and county taxes; fifty *per cent* of which said privilege tax shall be placed to the credit of the counties through which said railroad may pass, to be drawn by the county treasurers o the counties in proportion, to the number of miles of said roads in said respective counties: *Provided*, That lands owned by railroad companies, and not used in operating the railroads, shall be taxable as other property; and that this act shall not apply to the West Feliciana Railroad. Sec. 2. That this act take effect and be in force from and after its passage."

By this act it is clear that railroad property was selected for taxation and subjected to taxation. On the day of the approval of the foregoing general act, as stated, under guise of a defective enactment, a special act was approved whereby said sec. 21 was "made to apply to Natchez, Jackson & Columbus Railroad Company, etc." * * "And that all taxes, state, county and municipal, which have heretofore * * been assessed against said company or assessed or levied on its property, be and the same are hereby appropriated and set apart and shall be applied" as provided in sec. 21, acts 1878, p. 233.

The bill in Mills vs. Cook, 56 Miss., 45, was filed Jan.

4th, 1878, and on March 12, 1878, the chancery court dismissed the bill, and thereby held that the legislature had the power to repeal the exemption. In April, 1878, the supreme court held that while the legislature had power to exempt a *general* class, still that all classes of property selected for taxation must be taxed alike. So, concurrently with the re enactment of sec. 21, in 1878, there was a tax imposed by *general act* on railroad property, and a judicial interpretation rendered that all property of corporations and individuals selected for taxation must be taxed alike. Hence, the act of 1878 re-enacting sec. 21 was unconstitutional and void under Mills v. Cook, and according to defendants theory. There was, therefore, no exemption in effect in 1880.

Code 1880, chap. 10, sec. 597, provided that "each railroad company owning and operating a railroad in this state shall * * in each year, file with the auditor * * a complete schedule of all its property, real or personal", specifying length of road, switches, capital stock, bonded indebtedness, etc., etc. Sec. 599 provides that the governor, auditor, and secretary of state "shall * * assess the value of each railroad for the purposes of taxation", etc. "Sec. 604. The taxes so assessed in behalf of the state shall be due as other taxes, and if the same be not paid to the auditor * * within the time allowed other taxpayers, he shall proceed to collect the same by distress." "Sec. 605. The collector of taxes for any county, shall collect the amount due the county, as is now provided by law in the case of delinquents." "Sec. 606. The property of any railroad company lying or being in any city or * * town may be taxed for city or town purposes, upon a valuation thereof, made upon the same basis as the property belonging to individuals and no more, and this section shall apply alike to the foregoing and following modes of taxation herein provided for."

"HOW COMPANY RELIEVED FROM FOREGOING REQUIREMENTS."

Sec. 607. "Each and every railroad company which will accept this act, and annually pay to the auditor * * the taxes hereinafter provided for, and will signify their acceptance in writing shall be exempt (except from the last preceding section), from the provisions of the foregoing sections of this act until otherwise ordered and provided by law, and the payment of the same shall be in full of all state and county taxes; * * * *provided* that lands owned by railroad companies, and not used in operating the railroads shall be taxable as other property for all purposes."

"PRIVILEGE TAX ON EACH RAILROAD COMPANY"

Sec. 608. "Each railroad company whose line is in whole or in part in this state shall, if it accepts the provisions of this act pay to the state treasurer * * * in each and every year a privilege tax as follows, to-wit: specifying the several roads, and the amount of privilege tax, and among those specified is: "Natchez, Jackson and Columbus Railroad Company, thirty dollars per mile; * * Provided that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed although the whole road may not be finished."

Sec. 468, code 1880, of chapter 10, on public revenue, of which secs. 597-608 are a part, provides: "The following property, and no other, shall be exempt from taxation, towit:" specifying—but these do not include railroads; and the only exemption granted railroads are to those under process of construction under sec. 608, code 1880.

The code 1880 changes the act of 1878, *supra*, in that there the privilege tax was imposed primarily as a

commutation tax; by the code *ad valorem* taxes were primarily imposed; and to those companies that would *accept, in writing*, the provisions of chapter 10, the right was given of paying a privilege tax in lieu of state and county taxes on the railroad proper, but all municipal taxes and taxes on outlying lands had to be paid *ad valorem*.

Code 1880, sec. 8, provides: " * * All acts and parts of acts, the subjects of which are revised, consolidated and re enacted by this revised code, or repugnant to any of the provisions contained therein, shall be, and the same are hereby repealed, subject, however, to any express regulation relating thereto, which may be contained in this code." And sec. 8: "No private act, or act of local application, not revised or brought into this code, shall be affected by its provisions."

The subject of railroad taxation is "revised, consolidated and re enacted" by the code, and "each railroad" is required to pay *ad valorem* taxes, except that if they will accept the provisions of the act, in writing —that is thereby indicating their election to pay privilege instead of *ad valorem* taxes, they may pay privilege taxes; and the Natchez, Jackson & Columbus R. R. Co. is *expressly named* as one of the companies that may pay the privilege instead of *ad valorem* taxes.

Therefore, as correctly held in Lambert's case, (the author of the code of 1880 delivering the opinion), and in this case, the code of 1880 repealed the exemption of Natchez, Jackson & Columbus R. R. Co.

The general act of 1884 (p. 29), entitled, "An act to amend sections 607 and 608 of code of 1880, in relation to privilege tax on railroads, and for other purposes," provides: "that section 607 of the code of 1880 be so amended as to read as follows:" copying the exact language of sec 607, and then adding these words: "Any exemption in their charters to the contrary notwith-

standing as to such lands. And said lands shall be listed by assessors, and taxes shall be collected by the sheriffs and paid into the state and county treasuries; *provided, further*, that the provisions of this act shall not have the effect to tax any of the lands of the Memphis and Vicksburg Railroad Company, until the 1st day of February, 1886."

Sec. 2 reads exactly as section 603 of code 1880, except that the privilege tax is increased in amount and the specification as to the N., J & C. R. R. Co. is as follows: "The Natchez, Jackson and Columbus Railroad Company, forty dollars per mile after expiration of exemption as provided in its charter, and acts amendatory thereof." And adds to sec. 608 these words: "All the railroads not named herein and not exempt from taxation by their charters, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of any road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished nor where the same is now exempt from taxation by its charter."

This act of 1884 was construed by Lambert's case to have restored the exemption repealed by the code of 1880. In this case it was said that it was "doubtful" whether it was so restored.

Following the rule that exemptions are to be clearly and expressly granted; and that every presumption is against the grant, and that they cannot be extended beyond the express language of the grant; (*Y. & M. V. R. R. C. vs. Thomas, 66 Miss., 553*; S. C., 132; U. S., p. 174. *State vs. Simmons*, 70 Miss., 485.) This statute cannot be said to create an exemption. Applying this amendment to the code sections it amends, we find that it does not purport to amend secs. 597-606 of code imposing *ad valorem* taxes, but is confined to the amount

of privilege tax the several roads are to pay. In that light the statutes would read that Natchez, Jackson & Columbus R. R Co. must pay *ad valorem* taxes on the value of its road, unless that company will signify its acceptance of the act in writing and "pay to the state treasurer * * in each and every year, a privilege tax, as follows: * * The Natchez, Jackson & Columbus R. R. Co., thirty dollars per mile" under the code, and under act 1884. "forty dollars per mile after expiration of exemption as provided for in its charter, and acts amendatory thereof."

This would mean, strictly construed, that after the time, namely, thirty years from 1870, named in its amended charter, the N., J. & C. R. R Co. should pay a privilege tax of forty dollars in lieu of *ad valorem* taxes; but the *ad valorem* taxes of secs. 597-606 are for every year, *in presenti*, and not thirty years, *in futuro*. As there is no provision in the act of 1884 for a privilege tax on N., J. & C. Ry. Co., in lieu of *ad valorem* taxes of current years, but only for such privilege tax, after thirty years from 1870; and as the act of 1884 only amends secs. 607 and 608 of code of 1880, it would follow that no provision was made by the act of 1884 for the *ad valorem* tax of the N., J. & C. R. R. Co. for current years being commuted by a privilege tax.

If the words, "After expiration of exemption as provided in its charter and acts amendatory thereof," should be construed as meaning that the legislature assumed that the exemption then existed, and on this assumption provided the payment of the forty dollars privilege after its expiration, when, in fact, no such exemption then existed, it could not be held that it was the legislative intent to re-enact the exemption merely because it predicated the taking effect of the imposition of a tax at a future time upon this false assumption of fact.

Endlich Interpretation of Statutes, secs. 372, 3, and 4.

There is no repealing clause to this act; it provides

for amending secs. 707 and 708 of the code so as to read as there provided. The necessary result of not providing by the act of 1884 for a present privilege tax as commutation for present *ad valorem* taxes imposed by secs. 597-606," would be to leave the *ad valorem* taxes to stand and be exigible. The fact that provision is made for a privilege tax as commutation for *ad valorem taxes* imposed by secs. 597-606, *in futuro*, would be no modification of the statute imposing taxes *in presenti*.

When the code of 1880 and act of 1884 provided for general taxation of railroads, under const. 1869, art. 12, sec. 13, (as interpreted in Mills vs. Cook), all railroad property must be taxed, and the attempted restoration of special exemption to N., J. & C. R. R. Co., by the act of 1884 would have been unconstitutional.

But if the act of 1884 re enacted the exemption by providing that the time of payment of the privilege tax should not commence until after the expiration of the time granted by the charter, the general tax act of 1886, p. 23, repealed the exemption. Sec. 3 provides: * * "and hereafter all the railroads in this state shall pay the privilege taxes assessed against them under all the pains and penalties prescribed in sec. 589 of the code of 1880", and by sec. 6 it is provided: "That the act entitled 'An act to amend sections 607 and 608 of the code of 1880, in relation to privilege taxes on railroads, approved March 3, 1884', be so amended as to fix the amount of privilege tax to be paid by the several railroad companies mentioned and referred to in said act at sums twenty-five per centum greater respectively than the sums mentioned in said act; and hereafter said railroad companies shall pay privilege taxes respectively twenty-five per cent. greater per mile than as fixed in said act."

This act was an amendment to the act of 1884; the Natchez, Jackson & Columbus R. R. Co. was "mentioned" in said act: a privilege tax is imposed *in pre-*

senti of 25 per cent. more than the sums mentioned in said act; "and *hereafter said* railroad companies", *i. e.*, those "mentioned and referred to" in said act of 1884, "shall pay privilege taxes", etc. Not thirty years hence, but "hereafter", *i. e.*, after the passage of this act. There is not a squint at any exemption being further continued. Therefore, the supreme court of Mississippi correctly held in this case that this act of 1886 repealed any exemption created by the act of 1884.

In 1890 a general taxing act was passed, entitled "An act to amend the revenue laws", acts 1890, 6, which, after prescribing general privilege taxes, by sec. 5, provides: "That section (1) of the act of March 12, 1884, relating to railroad privilege taxes be amended by striking out the last proviso thereof, and that the same be re enacted as amended. That section two of said act of March 12, 1884, be amended by striking out all after the word "towit", in line nine, and inserting the following:

The Alabama Great Southern, per mile.....	$150 00
* * * * * * * * * * *	
The Natchez, Jackson & Columbus, per mile...	50 00
* * * * * * * * * * *	
The Yazoo & Miss. Valley, per mile.....	100 00
* * * * * * * * * * *	
The Mobile & Northwestern, per mile.....	150 00
And all other roads constructed and to be constructed, per mile.....	100 00

Provided no railroad shall be subjected to taxation while exempt by its charter, nor while the same is in process of construction, or within one year after completion, but such exemption shall not be for more than three years from the date the first rails are laid, and if any part thereof shall be finished and used for profit after such time, the same so used shall be taxed", etc.

In Lambert's case it was held that this act recog

nized the exemption if then in existence; but it did not hold that it created anew the exemption.

By this act taxes were imposed on railroads; that class of property was selected for taxation, and, when this was done, under secs 13 and 20, art. xii., const. 1869, it would be an unconstitutional exercise of authority to exempt any railroad therefrom. The body of this act imposes taxation on railroads, but the proviso by declaring that "no railroad shall be subjected to taxation while exempt by its charter" is an attempted legislative repeal of sec 13 art. xii., declaring that all property shall be subject to taxation, and of sec. 20, that taxation shall be equal and uniform. Under the rule of *Mills* vs. *Cook*, 56 Miss. 40; *Lambert's case*, 70 Miss., 779; *Worrell* vs. *Vicksburg Bank*, 67 Miss., 47, all of which are relied on by plaintiff in error as correct, and of *Adams* vs. *Miss. Bank*, 75 Miss., 701, this proviso would be unconstitutional, if it created anew an exemption.

The true construction of said secs. 13 and 20, art. xii., const. 1869, is that adopted by the court in this case, following the decisions of this court, in *Louisville* vs. *Palmes*, 109 U. S, 248; *St. Louis* vs. *Berry*, 113 U S., 475; *Schurz* vs. *Cook*, 148 U. S., 408; *Keokuk* vs. *Missouri*, 152 U. S., 310 12. whereby it is declared that these provisions are mandatory upon the legislature, and deprive it of the power to exempt from taxation.

The rule is settled that this court will interpret for itself the contract, *Dennis* vs. *V. S. & P. R. R. Co.* 116. U. S. 665, and in so doing it will find that under its own decisions, now concurred in by the State court, there never existed any legislative power to grant the exemption claimed. If this writ of error had come from the circuit court of the United States this court would have followed its own decisions upon this question With the writ of error from the State court, seeking to reverse the construction of the State court which fol-

lows the settled rule of construction of this court, it could hardly be that any other conclusion could be reached.

Citizens Sav. Bank vs. *Owensboro* 173, U. S. 643.

It follows, therefore, that when the constitution of 1890 was framed there was no existent exemption from taxation and could be none in Natchez, Jackson & Columbus R. R. Co.

EXEMPTION: L., N. O. & T RY. CO.

Let us now trace the exemption claimed under section 5. of the acts of 1882 and 1884 as applied to the consolidated corporation, Louisville. New Orleans & Texas Ry. Co.

The constituent companies of the Louisville, New Orleans & Texas Ry. Co. were New Orleans, Baton Rouge, Vicksburg & Memphis R. R. Co. (R. 21) whose charter was granted in 1882, and which contained, as granted, no exemption, and Memphis & Vicksburg R. R Co. (R. 31.) granted in 1870, and to which said 21st section was extended by the said act of Aug. 8. 1870.

By said act of 1875, p. 66, and said act of 1878, p. 87, and by the code of 1880, Secs. 597-606, it is indisputable that this exemption was repealed. The Memphis & Vicksburg R. R. Co. is not named in Sec. 608, code 1880, fixing a privilege tax in lieu of *ad valorem* taxes. There had at that time been nothing done under said Memphis & Vicksburg R. R Co.'s charter as shown by the evidence in this record on the first trial.

By the code of 1880, as shown, all railroad property was subjected to *ad valorem* taxes. Railroad property was then selected for taxation, and under Miss. Mill vs. Cook, supra, Vicksburg Bank vs. Worrell, supra, Lambert's case, supra, whenever this was done Sec. 13, art. 10, xii, required all to be taxed alike.

General taxation of railroad property was the rule established by the code of 1880.

In 1882 said Sec. 5 was enacted, and by the said act of 1884 it was extended to the consolidated company to be formed by Memphis & Vicksburg R. R. Co. and the other consolidating companies. By this said special exemption was granted by special act to a special corporation when by the code of 1880 railroad property had been selected for taxation and still so continued as evidenced by the act of 1884 amending the code of 1880 in this regard. Therefore, this special grant of an irrepealable exemption would be condemned as unconstitutional by the Miss. Mills and Vicksburg Bank vs. Worrell cases themselves. The grant of the exemption was void *ab initio*.

Said general taxing act of 1884, approved March 12, amended said section 607 code 1880 by adding these words: "provided further that the provisions of this act shall not have the effect to tax any of the lands of the Memphis & Vicksburg Railroad Company until the first day of February, 1886." and amended by Sec. 2, Sec. 606, code 1880, to read: "Each railroad whose line is in whole or in part in this State, shall if it accepts the provisions of this act, pay to the State Treasurer on the warrant of the Auditor, on or before the 15th day of December in each and every year, a privilege tax as follows, towit: The Mobile & Ohio Railroad Company and branches, one hundred dollars per mile; the Chicago, St. Louis & New Orleans Railroad Company and branches, or the Illinois Central Railroad Company and branches, one hundred dollars per mile; the Memphis & Charleston Railroad Company, one hundred dollars per mile; the New Orleans, Mobile & Texas Railroad Company, or Louisville & Nashville Railroad Company, $100 per mile; the Mississippi & Tennessee Railroad Company, $100 per mile; the Alabama Central Railroad Company, $100 per mile; the Alabama Great Southern Railroad Company, $100 per mile; the Vicksburg & Meridian Railroad Company,

$80 per mile; the West Feliciana Railroad Company, $30 per mile; the Grand Gulf and Port Gibson Railroad Company, $30 per mile; the Mississippi Valley & Ship Island Railroad Company, $40 per mile; the Ship Island, Ripley & Kentucky Railroad Company, $25 per mile; the Mobile & Northwestern Railroad Company, $20 per mile; the Greenville, Columbus & Birmingham Railroad Company, $40 per mile; the Natchez, Jackson & Columbus Railroad Company, $40 per mile, after expiration of exemption as provided in its charter, and acts amendatory thereof. All railroads not named herein, and not exempt from taxation by their charters, sixty dollars per mile; *provided*, that no railroad company shall be subject to taxation under this chapter while the same is in process of construction, but if any part of the road shall be finished and used for profit, the part so finished shall be taxed, although the whole road may not be finished nor where the same is now exempted from taxation by its charter."

It is clear that the proviso to section 1, *supra*, exempting *lands* of Memphis & Vicksburg R. R. Co until Febry., 1886, was unconstitutional, because all other lands were taxed. Memphis & Vicksburg R. R. Co. and New Orleans, Baton R., V. & M. R. R. Co. are not specifically mentioned in this section 2, and therefore, they, with their consolidation, Louisville, New Orleans & Texas Ry. Co., would come under the general clause of "all the railroads not named herein and not exempt by their charters, sixty dollars per mile;" and that its exemption or not must be controlled by the application of the proviso to section 2.

The attempted grant of the exemption in 1882 and 1884 to the consolidated company, Louisville, New Orleans & Texas Ry. Co. was, as we have seen, unconstitutional and void, and hence, the privilege tax of sixty dollars per mile in lieu of *ad valorem* taxes was absolute.

The said Sec. 5 applied only to the consolidated

company and conferred no exemption upon the several constituent companies. This act imposing the taxes was approved March 12, 1884. The act authorizing consolidation was approved three days later March, 15, 1884. Interpreting the language, *strictissimi juris*, it is clear that on March 12, 1884, Louisville, New Orleans & Texas Ry. Co., the consolidated road, was not within the exception of railroads "exempt from taxation by their charter; nor within that of the proviso, where the same is *now* exempt from taxation by its charter." On March 12, 1884, there was no corporation in existence answering these terms. Three days later one was authorized to be created, and this power was exercised Aug. 12, 1884. Therefore, it cannot be said, as was done in Lambert's case with reference to this act of 1884 in reference to N. J. & C. R. R. Co. that this act of 1884 "re enacted the exemption." If this general revenue act of 1884 did not preserve the exemption, then, by it the tax would be expressly imposed. In this view the act of 1884, R. 44, authorizing consolidation "with the rights, privileges and immunities in said act (1882) mentioned" would not be construed to create an exemption under Sec. 5.

Covington vs. *Kentucky* 173, U. S. supra.

But if said sec. 5, with its irrepealable exemption, did operate to vest such exemption in Louisville, New Orleans & Texas Ry. Co. upon its creation Aug. 12, 1884, by said code of 1880 and said general tax act of 1884 the legislature selected railroads for taxation, and all railroads must then be taxed under the rules of the cases cited and relied on by plaintiffs in error in this plea.

To create an irrepealable exemption as Sec. 5 (21) attempts to do would plainly violate said provisions of the constitution of 1869.

In an unreported case of Adams vs. Ga. Pacif. R. R. Co. it was held in 1892 by the circuit court of the

United State for the northern district of Miss., Eastern Division, that this 21st section granting an irrepealable exemption was unconstitutional and void.

The general taxing act of 1886, p 23, amending the code of 1880, distinctly imposes privilege taxes in lieu of *ad valorem* upon the railroads "mentioned and referred to" in said act of 1884. It is clear, as shown in reference to the N. J. & C. R. R. Co., and as held by the supreme court, that this act repealed the exemption, if then existent.

By the act of 1890, herein before set forth, Louisville, New Orleans & Texas Ry. Co. was embraced in the general language: "And all other railroads constructed, or to be constructed, per mile $100. Provided no railroad shall be subjected to taxation while exempt by its charter." etc. This, as shown, supra, would not create an exemption; if it did it would be unconstitutional for the reasons heretofore set forth.

The constitution of 1890 ordained by Sec. 112: "Taxation shall be uniform and equal throughout the State. Property shall be taxed in proportion to its value. * * * Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value. But the legislature may provide for a special mode of valuation and assessment of railroads, and other corporate property, or for particular species of property belonging to persons, corporations or associations not situated wholly in one county. But all such property shall be assessed at its true value." etc.

"Section 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing shares according to the value thereof (augmented by the accumulations, surplus and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions

from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature."

"Section 182. The power to tax corporations and their property shall never be surrendered or abridged by any contract or grant to which the State or any political subdivision thereof may be a party, except that the legislature may grant exemption from taxation in the encouragement of manufactures and other new enterprises of public utility extending for a period of not exceeding five years, the time of such exemptions to commence from the date of charter, if to a corporation;" etc.

This constitution removed all doubt as to the meaning of Sec. 13, art xii, const. 1869, for it requires the property of corporation to be taxed in the same way and to the same extent as that of individuals. It was construed in *Adams* vs. *Miss. Bank.* 75, Miss. 701, and it was there held that the property of corporations must be taxed when taxes were imposed upon that class of property, and that there could not be special exemptions from taxation.

In Lambert's case this clause of Sec. 181. "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature," was disposed of by this language: "Section 181 of the constitution has no effect as to the exemption claimed. It left the matter as if the constitution had not been adopted. It let it alone, to rest upon legislation, unaffected by the fundamental law," p. 790.

In 1892 there was a new code framed containing these provisions: Section 3875 requires that

"each railroad company owning and operating a railroad, shall, on or before the first Monday of April each year, file with the Railroad commission a complete schedule, under oath, of all its property, real or personal, taxable and non-taxable, setting forth therein the length in miles * * * its entire roadbed, switches * * * and showing how many miles or fractions thereof, lie in this State, and in each county in this State, and in each city * * * and the value of the whole and each part thereof, as subdivided herein; the total amount of the capital stock, its par value and its actual value, and the value of its franchise; the number of engines and their respective values; the gross amount of the receipts of the year proceding, etc. etc. * * and if any of said property is claimed to be exempt from taxation, it shall be separately stated, and the law cited under which the claim is made." By Section 3876, in case of failure to furnish the schedule, "the commission shall make out the schedule from the best information obtainable."

Section 3877. "The members of the railroad commission are constituted state railroad assessors, and they shall, upon the receipt or making and completion of the schedule provided for in the last two sections, assess all railroads, telegraph, sleeping car and express company property liable to taxation, affixing its true value, so that such property shall bear its proportion of taxation" etc.

By Section 3878, if the railroad assessors have reason to believe that the schedule, as furnished, is false or fraudulent, they shall not be bound thereby, but shall make proper assessment, giving notice to the railroad company to show cause: "such notice shall be served and returned as a summons from a court."

By Section 3879 full records of the proceedings are required to be kept of all things done by the State railroad assessors.

By Section 3880, the assessment, as made, shall remain on file subject to objections; and by Section 3881, the State railroad assessors shall hear and consider objections to said assessment; and "they shall remain in session until all objections are heard and disposed of, and they may, if they think objections just, sustain the same and amend assessments, if necessary, accordingly."

By Section 3882, the assessment is to be affirmed after all objections are disposed of.

Section 3744, Chapter 116, Code 1892, of which the foregoing sections are parts, provides:

"The following property, and no other, shall be exempt from taxation;" specifying, but not including railroads.

Chapter 108, Code 1892, on "Privilege Taxes," by Section 3317, provides: "A tax on privilege is levied as follows: * * * 3379, Railroads: Railroads are divided into four classes: first, second, third, and narrow gauge, and privilege taxes are levied on them as follows: On each railroad of the first class, per mile, $20: On the second class, $15: On the third class, $10: On a narrow gauge class, $2. The Railroad Commission shall, annually, on or before the first Monday of August, classify the several railroads according to the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December."

Code 1892, Section 3: "* * * All Acts or parts of Acts, the subjects whereof are revised, consolidated and re enacted by this Annotated Code, or repugnant to the provisions contained therein, shall be, and the same are hereby repealed," etc. And Section 8 provides, that "private and local laws not revised and brought into this Annotated Code are not affected by its adoption unless it be expressly so provided herein."

By these provisions of the code of 1892 the su-

preme court held that the exemption, if existent, were repealed.

There is no pretense that the code of 1892 under which these taxes were levied has ever been construed to uphold the exemption. These masterly opinions of the supreme court are referred to as a clear and conclusive presentation of the law and the facts upon this point, and they demonstrate that there is no vested right in any of the decisions of the State court, and that the question here decided was not decided by those cases.

CONSIDERATION OF CONTRACT.

The alleged contract of exemption is not such a contract as that its obligation cannot be impaired because of the Federal Constitution.

The Natchez, Jackson & Columbus R. R. was completed in 1883 — the plea is silent on this point; — the Louisville, New Orleans & Texas Railway, as the plea avers, was commenced in 1882 and completed in the latter part of 1884, adding branches thereto, as authorized by said acts and contemplated therein, from time to time, until the year 1891. (R. 560.) These "branches" are not averred to have been *constructed* by L. N. O. & T. Ry. Co. The Lambert case held that the code of 1880 repealed the exemption of Natchez, Jackson & Columbus R. R. Co., and that it was re enacted in 1884; so, when the exemption was re enacted it was upon the constructed road. The consolidation creating Louisville, New Orleans & Texas Ry. Co. was effected August 12, 1884, and the plea avers the road was constructed from 1882 to the latter part of 1884, whether before or after Aug. 12, is not averred — every presumption is against the plea and against the exemption.

The consideration to the State for the grant of said 21st section was benefits *to be received* by a railroad *to be constructed*; the language evidences an intention to

induce the investment of capital in railroads *to be built*, and not to grant a *bonus* to a road *already built*. There must be a good consideration to uphold an exemption as a contract.

Home vs. *Rouse* 8, Wall, 438.

"A past or executed consideration is not sufficient to support an assumpsit unless such consideration was moved by the preceding request, either express or implied of the party promising. *1 Chitty. Cont.* 11th, ed. 69.

This exemption was a 'mere grace.'

Lambert's case, 70 Miss. 789.

Where the contract of exemption is not based upon a good consideration no contract exists within the protection of the federal constitution.

Tucker vs. *Ferguson* 22, Wall. 527.

West Wis. &c. R. R. Co. vs. *Board* 93, U. S. 595.

Pearsall Great North, Ry. Co. 161, U. S. 667.

Grand Lodge vs. *New Orleans* 166, U. S. 143.

Where the exemption is granted by the same instru- that creates the corporation a consideration will be presumed, but where, as here, the exemption to the N. J. & C. R. R. Co. was not created until 1884, and that of Louisville, New Orleans & Texas Ry. Co. not until after the railroad had been built under the charter of one or the other of the constituent companies, and before the creation of the consolidated company no such presumption exists: and the consideration must be averred and proved as in declaring upon other contracts.

Grand Lodge New Orleans, 166, U. S. 148.

None of the property involved in this suit ever belonged to Natchez, Jackson & Columbus R. R. Co. and, therefore, the exemption of the charter of that road does not extend to this case; but the history of that exemption is so interwoven with the decision in the Lambert case that it was deemed best to show its true status in this connection.

Said plea 4. also averred that in 1892 3-4 and 5, had

been applied the amount of the taxes to the debts of construction of L. N., O. & T. Ry. Co., or in the payment of money borrowed and used in construction, and that the affidavits required by said sec. 21 had been made and delivered each of said years to the tax-collectors, and that said tax-collectors had executed the receipts for said taxes—but not averring that said road could not pay 8 per cent. dividend. R. 568.

These same matters, with the averment of the contract of appropriation evidenced by said 21st section, were set up in the 2nd plea, R. 551, and not embraced in the order to strike out.

So, whatever merit there was in this defense it was preserved, and not stricken out.

The fifth plea (R. 569) pleads the Lambert case as *res-adjudicata*, and the sixth plea pleads said decisions of the state court, the refusal of the legislature to repeal the exemption and the uniform conduct of the departments of State recognizing the exemption, as an estoppel. R. 573.

As hereinbefore shown these pleas could not avail if the fourth plea could not.

The state court in its opinion held that the Lambert case was *res adjudicata* as to the taxes for 1891 and 2 upon that part of the property acquired from N. J. & C. R. R. Co. in Adams county; and that as to the other years taxes, and as to the property involved in this suit these cases had the force of *stare decisis* only.

In this there was no federal question raised or decided, for the decision upon the first appeal was 'the law of the case,' and could not be varied by amendment to let in a federal question, even if these pleas raised such question.

Mut. Life Ins Co. vs. *Kirchoff*, 169, U. S. 107.
Citizens Sav. Bank vs. *Owenboro* 173, U. S. 647.

WITHDRAWAL OF PLEAS.

The withdrawal of all the pleas and the refusal to

plead further was a confession of the declaration, and precludes any complaint by plaintiffs in error of the judgment in this court.

When the court sustained the motion to strike out pleas 3. 4, 5, and 6, the plaintiffs in error withdrew all the pleas upon which the first trial was had, and plea 2 filed after remand, and *declined to plead further.* R. 610. 1.

1. The effect of such withdrawal did not deprive the court of jurisdiction of the person

Eldred vs. *Bank.* 17, Wall, 551.

2. The effect of withdrawing a plea under the Mississippi practice is the same as if a demurrer had been sustained to it.

Rocco's case 37, Miss. 357.

To withdraw a plea means to waive the defense set up by it.

Barker vs. *Shephard* 42, Miss. 281-2.

"The withdrawal of all pleas, after the testimony has been put before the jury, would be an abandonment of all the defenses, and the jury should be discharged and judgment rendered *nil dicit.* If one plea is withdrawn in such circumstances, it is a conclusive admission that further opposition to a recovery will not be made by reason of anything that had been proved, or that might be under that plea. That much of the case has been blotted out, * * If such be the consequences, the defendant is precluded from complaining that the circuit court admitted improper testimony under the plea thus withdrawn. If he proposed to controvert these rulings, he should not have surrendered that part of the case which called them forth. His 'confession,' implied by the withdrawal of the plea of *non assumpsit,* cured all defects in the plaintiffs testimony offered in proof of his cause of action, and waived any right he might have had to review the rulings of the circuit court on the questions pertinent to that issue, and to it alone."

Perkins vs. *Guy* 55, Miss. 180.

Lewis vs. *Buckley* 73, Miss. 61.

This withdrawal was a "confession" of the declaration, and of the averment that the Illinois Central R. R. Co. purchased all the railroad and other property of Louisville, New Orleans and Texas Ry. Co., and that in 1892 said Illinois Central R. R. Co. turned over and delivered to and merged all of said property and railroads of said L. N. O. & T. Ry. Co. with the railroad system and property of Yazoo Miss. Valley R. R. Co., and that since 1892 said Yazoo Miss. Valley R. R. Co. under the direction and control of the Illinois Cen. R. R. Co. has been operating said railroads of L. N O. & T. Ry. Co., and that by taking the property said defendants became liable to pay the taxes.

A confession of these facts takes the case outside of all questions decided on the first appeal in reference to the consolidation of Yazoo & Miss. Valley R. R. Co. and L. N. O. &. T. Ry. Co., under the powers contained in their respective charters, and the alleged guaranties of the federal constitution. If the Illinois Central R. R. Co. *purchased* the railroad, as confessed, then, none of the decisions of the Mississippi supreme court relied on in the pleas stricken out could have any hearing whatever.

The pleas withdrawn *traversed* this alleged purchase by Illinois Central R R. Co., and under the rule of the cases, supra, this withdrawal was a conclusive admission of record that the matters set up in the pleas constituted no defense.

The withdrawal of the pleas confessed that these matters set up thereby were no defense: 1. That Louisville, New Orleans & Texas Ry. Co. was authorized by and organized under said acts of 1882,1884. 2. That on Oct. 24, 1892, L. N. O. & T. Ry. Co. was consolidated with and merged in Yazoo & Miss. Valley R. R. Co. by the deed, and as authorized by their respective charters: 3. That in 1892, 3, 4, and 5, Yazoo & Miss. Valley R. R. Co. delivered to the several tax collectors the affidavit prescribed by section 21 and received a receipt in full for said taxes,

and that in said years 1892, 3, 4, and 5 respectively the profits of Yazoo & Miss. Valley R. R. Co., nor of Louisville, New Orleans and Texas Ry. Co. had ever enabled either to pay a dividend of 8 per cent on its capital stock. R. 55. 4. That said 21st section, through sec. 5, had been extended to the consolidated road and that Yazoo & Miss. Valley R. R. C. had acquired it by the consolidation of 1892; that said 21st section was not merely an exemption but an irrepealable contract of appropriation, and that in reliance upon and in pursuance of said contract large amounts of money had been expended in construction etc; that for each of said years debts of construction etc. conformably to sec. 21. had been paid, the required affidavit made, and receipts executed in full for the taxes; that Illinois Central R. R. Co. was not a purchaser of said railroad etc. traversing the declaration in this regard. R. 551.

Each and every of these defenses are confessed to be no defense. If the defendants confess that the profits enabled them to pay an 8 per cent dividend, as they do, then the contract of exemption or appropriation expired by the happening of that event and according to its terms.

It is distinctly declared in *Perkins* vs. *Guy*, supra, that error cannot be predicated of a withdrawn plea. Therefore, the state court could not reverse for any matters embraced in these pleas.

But defendants did more than to withdraw their pleas. They declined to plead further. This declining had reference to the pleas stricken out. Declining to plead further would imply that there was a willingness on the part of the court to allow proper pleas to be filed, in a proper manner, having regard for the court's control of the proceedings before it. Defendant's declined to have any further connection with the defense. This leaves them in the attitude of withdrawing the defense made, and attempting to stand on pleas not allowed to be filed—out of the record—and refusing to make them part of the record by obtaining leave to file, or making the pleas

stricken out conform to the views of the trial judge, so that their merits might be tested by demurrer or issue.

After a trial on the pleas, and a decision on the issues made by them in the supreme court, on the first appeal, and when, upon remand, the case stood for trial on them again, these pleas, and, also, the 2nd plea filed upon remand, were voluntarily withdrawn, leaving the case without plea. This "confession" of the issues made by them in plaintiffs favor entitled plaintiff to judgment, even though the decision of the supreme court on the first appeal had the effect to violate the federal constitution as averred in the 4th, 5th and 6th pleas; for, if by special verdict the finding had been, that the Illinois Central R. R. Co. had purchased the railroad, as averred; or that the profits had enabled Yazoo & Miss. Valley R. R. Co. to pay 8 per cent. dividend, etc.; that there existed no longer a construction debt, etc., to be paid, etc., then, the immunity from taxation by the terms of the act had ceased, by the happening of the condition subsequent upon which it was granted. These findings of fact constitute a satisfaction of the contract, and proceed upon the validity of the contract itself. The pleas stricken out seek to establish by appeal to the constitution of the United States the validity of the contract; the confession of the issues made by these pleas renders that unnecessary, for whether valid or invalid is immaterial if the conditions of the grant have happened. *Ipso facto* the immunity from taxation ceased.

3. The withdrawal of these pleas destroys every vestige of the right to invoke the jurisdiction of this court.

The pleas withdrawn were the pleadings and record upon which the first trial was had and the first opinion of the supreme court delivered. These pleas and the action of the supreme court on the first appeal thereon constitute the gravamen of the complaint of the suggestion of error and of the 4th, 5th and 6th pleas stricken out, and are the foundation of the jurisdiction, if any, of this court.

By the voluntary act of defendants on the second

trial not a single defense is left in the record as a basis of judicial action upon which the first trial and the first appeal was had. Upon the second trial and upon the second appeal the court did not have before it for decision, in the record, a single defense upon which its first opinion was predicated.

The cause was reversed on the first appeal and stood for trial *de novo* Upon the record, so made, and without judicial action on the defenses upon which the decision of the first appeal was predicated, it is sought to attack and review by this writ of error the action of the supreme court on the first appeal, when on the second trial, *de novo*, every defense made on the first trial was withdrawn, and thereby plaintiffs in error contend their constitutional rights were invaded. No possible prejudice could arise from the first decision unless it was given force by application on the second trial of the case. This court, therefore, to question this first decision must disregard this withdrawal of the pleas, and proceed to give effect to these pleas as if never withdrawn. This court must assert defenses here that the parties confessed were no defense on the second trial.

The second plea filed after remand, R. 551, set up that said section 21 was more than an exemption and was a contract of appropriation, and, therefore, as averred, outside of the purview of secs. 13 and 20, art xii., const. 186 , and that this contract had been performed.

This 2nd plea was, also, withdrawn after issue was taken on it. The supreme court had never passed on this plea, and it is confessed to be without merit by its withdrawal. And, yet, while refusing to try the case on the issue made by this plea in the state court, this theory of contract of appropriation is now here asserted as an avenue to attain jurisdiction. Plaintiffs in error refuse to contend below for the contract of appropriation—withdraw the plea setting up that as the contract—and here

make that the gravamen of their appeal to the protection of the federal constitution.

Counsel must be presumed to have been familiar with Lambert's case, and the method in the madness of withdrawal was, that that very case, upon which so much reliance is averred to have been placed, had set up this contract of appropriation theory, and the court had held it to be an exemption.

It cannot be shown *by the record* that any right passed upon on the first appeal was asserted and denied by the court on the second appeal. The withdrawal of all defenses made on the first trial stands an impassable barrier to their investigation now and here.

REMOVAL PROCEEDINGS.

After reversal, upon the first appeal, there was a petition filed to remove the cause, No. 2788, consolidated, the suit for the taxes of 1892, 3, 4 and 5, to the federal court by Yazoo & Miss. Valley R. R Co., a Mississippi corporation, and Illinois Cen. R. R. Co., an Illinois corporation, upon the ground that said decision upon the said first appeal deprived them of their rights under the federal constitution. This petition was denied by the court July 4, 1898. R. 544.

1. This petition was too late.

Rosenthall vs. *Coates*, 148 U. S., 142.
K. C. R. R. Co. vs. *Doughty*, 138 U. S., 303.
Galveston vs. *Texas*, 170 U. S., 226.
Mut. Life Ins. Co. vs. *Kirchoff*, 169 U. S., 103.

2. No federal question is raised by the declaration, and the defendants cannot by plea, even, much less by the averments of a petition as to the effect of a decision create a federal question. United States vs. Lewis, 178 U.S. 457

Chappell vs. *Waterworth*, 155 U. S., 102.
Walker vs. *Collins*, 167 U. S., 57 60.

Hence, as to suit No. 2788, consolidated, for the taxes of 1892, 3, 4 and 5,—the only taxes complained of in the

petition for removal—the petition was properly denied.

There was filed Dec. 24, 1897, (R. 611-8) a declaration between the same parties, returnable to the January term, 1898, of said state circuit court, seeking recovery for the taxes on the same property for the year 1897, upon the same allegations as for the years 1892 to 1895 inclusive, and numbered 3142.

There was filed Dec. 18, 1896, (R. 622 9) another declaration between the same parties, returnable to January term, 1897, to recover the taxes for 1896 on the same property, and numbered 3059, containing substantially the same allegations.

The summons in each case was omitted from the transcript under Rule 3, (Sup. Ct. Rules, 70, Miss. xx) providing: "A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions, and order, judgment or decree appealed from, unless the appellant shall, by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript," etc.

Code 1892, Sec. 722, provides: "The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the court, by rule or otherwise, may allow," etc.

No pleas were filed in numbers 3059 and 3142.

On July 7, 1898, (R. 610) all of defendant's pleas were withdrawn in No. 2788, consolidated. On July 8, 1898, an *agreed order* of consolidation of Nos. 2788, 2916, 3018 (comprising 2788, consolidated), with 3059 and 3142, was made, and reciting that "hereafter all of said suits shall proceed as one suit under number 2788, and it is ordered that all the orders, proceedings and pleadings in one shall be appropriated to each and all of said cases, with the proper changes in dates and amounts for each of said years 1892, 1893, 1894, 1895, 1896 and 1897. This order is made to save the expense and inconvenience of separate pleadings and trials in each case, and is not to be construed to the

prejudice of either party, and all objections and exceptions are reserved which could be reserved if the said orders, procedings and pleadings were all separate. This order at the request of all parties is entered as of the 4th day of July, 1898, and shall take effect as of that date, at which date the same was made" (R. 610-1).

These removal procedings did not embrace a petition or bond for either Nos. 3059 or 3142, but were confined to No. 2788 (R. 542-3), and, hence, the removal procedings, depending as they do on petition and bond, could not be embraced in the terms of said consolidating order.

2. Giving to that order its full scope, it is merely an agreement of counsel, entered on the minutes of the court, on July 8th, as of July 4th agreeing that the orders, procedings and pleadings from that date shall be taken as applicable to all the cases.

The court ruled on but one application for removal, and that was in No. 2788; and counsel by stipulation could not bring the cases under the act of congress by agreeing that the order made on one petition for removal should apply to another and a different case, nor substitute a petition and bond in each case.

1 Desty. Fed. Pro. 9th Ed., p. 518-9.

Nor can removal be effected without the action of the court. *Id.*

We ask the special attention of the court to the opinion of Mr. Justice Whitfield in this case (R. 638) as a demonstration of the true interpretation of the statutes, decisions and constitutions of the state of Mississippi under both state and federal jurisprudence. It is characterized by deep and intelligent research, clear and discriminating definition, cogent and logical reasoning, and it is an unanswerable application of the law to the facts.

Wherefore, the motion to dismiss should be sustained, or, at least, the judgment should be affirmed.

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